FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-79-327

CBS INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (APPENDIX II)

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August 28, 1979

TABLE OF CONTENTS

	Page
Constitutional provision, statutes and rule involved	A-1
Pleading In Intervention, filed by CBS Inc. in *United States* v. *National Broadcasting Co., Inc.*, Civil 74-3601-RJK (C.D. Cal.), dated April 20, 1977	A-2
Notice of Motion and Motion to Intervene Under Rule 24, FED. R. CIV. P., filed by CBS Inc. in *United States* v. *National Broadcasting Co., Inc.*, dated April 20, 1977	A-5
Memorandum of Decision and Order [*inter alia*, denying motion of CBS Inc. to intervene], *United States* v. *National Broadcasting Co., Inc.*, filed June 20, 1977	A-9
Memorandum [affirming, *inter alia*, denial of motion of CBS Inc. to intervene], *United States* v. *National Broadcasting Co., Inc.*, filed June 4, 1979 ...	A-18

Constitutional Provision, Statutes and Rule Involved

[The constitutional provision and statutes are set forth in Appendix I at 1a-6a].

RULE 24, FEDERAL RULES OF CIVIL PROCEDURE

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Pleading In Intervention

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil Action No.

74-3601-RJK

—o—

UNITED STATES OF AMERICA,

Plaintiff,

against

NATIONAL BROADCASTING COMPANY, INC.,

Defendant.

CBS INC.,

Intervenor.

—o—

ROBERT S. RIFKIND
LLOYD N. CUTLER
WILLIAM W. VAUGHN
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and

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Attorneys for Intervenor CBS Inc.

Pleading In Intervention

PLEADING IN INTERVENTION

CBS INC., by its attorneys, alleges:

1. CBS Inc. ("CBS") is a corporation organized and existing under the laws of the State of New York. CBS is engaged in the business, among others, of (a) operating five television stations, owned by it, each of which is engaged in local broadcasting under FCC licenses, and (b) operating the CBS Television Network ("CTN") which makes available a comprehensive schedule of news, public affairs, instructional, children's, sports, religious, documentary, entertainment and other programming to those five television stations and to approximately 200 independently owned and operated television stations affiliated with CTN. CBS sells to advertisers the right to have their commercial announcements broadcast in association with particular network programs by those of CBS's owned stations and its affiliated stations that choose to broadcast those programs.

2. Most of the entertainment programming offered by the CBS Television Network is obtained by CBS under licensing arrangements with program producers. CBS continually seeks out potential programs and is continually entering into arrangements for the licensing, development and production of such programs.

3. On November 17, 1976, plaintiff United States of America and defendant National Broadcasting Company ("NBC") filed with this Court a Proposed Consent Judgment for the Court's consideration pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1974) ("APPA").

4. The Proposed Consent Judgment is anticompetitive, because it would suppress competition among producers of television entertainment programming and thereby restrict the supply of programming and drive up program prices.

Pleading In Intervention

5. Because it is anticompetitive, the Proposed Consent Judgment is contrary to the public interest, as defined by the Sherman Act, 15 U.S.C. § 1, *et seq.*, and the APPA.

6. Because it is anticompetitive, the Proposed Consent Judgment would prejudice CBS's interest as a licensee of television entertainment programming.

WHEREFORE, CBS respectfully prays that the Court not enter the Proposed Consent Judgment submitted by the Government and NBC, or any other judgment that would have the effect of suppressing competition among producers of television programming, and that the Court order such other and further relief as the nature of the case may require and the Court may deem just and proper.

Dated: April 20, 1977.

By /s/ ROBERT S. RIFKIND
Robert S. Rifkind
Attorney for Intervenor
CBS Inc.

Notice of Motion and Motion to Intervene

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 74-3601-RJK

—o—

UNITED STATES OF AMERICA
Plaintiff,

against

NATIONAL BROADCASTING COMPANY, INC.,
Defendant.

CBS INC.,
Applicant for Intervention.

—o—

ROBERT S. RIFKIND
LLOYD N. CUTLER
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Attorneys for CBS Inc.

Notice of Motion and Motion to Intervene

NOTICE OF MOTION AND MOTION TO INTERVENE UNDER RULE 24, FED. R. CIV. P.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on May 10, 1977, at 10:00 a.m., or as soon thereafter as counsel may be heard, CBS Inc. ("CBS"), in the courtroom of the Hon. Robert J. Kelleher, United States District Judge, United States Courthouse, 312 North Spring Street, Los Angeles, California, will make the within motion under Rule 24, Fed. R. Civ. P., for an order permitting CBS to intervene in this action.

Dated: April 20, 1977.

By /s/ ROBERT S. RIFKIND
Robert S. Rifkind
Attorney for Intervenor
CBS Inc.

Notice of Motion and Motion to Intervene

MOTION

CBS hereby moves the Court:

(1) for leave to intervene as of right in this action pursuant to Rule 24(a)(2), Fed. R. Civ. P.;

(2) in the alternative, for leave to intervene in this action pursuant to Rule 24(b)(2), Fed. R. Civ. P.

This motion is made upon the grounds that:

(1) the proposed consent decree filed with the Court by the Government and the National Broadcasting Company ("NBC") would suppress competition among producers of television programs;

(2) such a suppression of competition among the producers of television programs would severely prejudice CBS, which is a major purchaser of such programs;

(3) CBS's interest is not represented adequately by the Government or NBC;

(4) entry of the proposed consent decree would impair or impede CBS's ability to protect its interest in vigorous competition among producers of television programming; and

(5) CBS's claims or defenses in *United States* v. *CBS Inc.*, Civ. No. 74-3599-RJK (C.D. Cal.), and the present action have questions of law and fact in common.

This motion is based upon the accompanying Notice of Motion, the supporting memorandum submitted herewith,

Notice of Motion and Motion to Intervene

the affidavits of William J. Baumol, Paul L. Joskow, and Roger H. Cummings and the comments of CBS on the Proposed Decree, annexed to the supporting memorandum as Appendices A to D, CBS's Pleading in Intervention, the proposed Final Consent Judgment filed by the Government and NBC, the Government's Competitive Impact Statement, and all other papers and pleadings filed in this action.

Dated: April 20, 1977.

By /s/ ROBERT S. RIFKIND
Robert S. Rifkind
Attorney for Intervenor CBS Inc.

District Court Memorandum of Decision and Order

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 74-3601-RJK

—o—

UNITED STATES OF AMERICA,
Plaintiff,

v.

NATIONAL BROADCASTING COMPANY, INC.,
Defendant.

—o—

MEMORANDUM OF DECISION AND ORDER

This is a civil antitrust action brought by the government pursuant to § 4 of the Sherman Act, 15 U.S.C. § 4 (1970), charging defendant NBC with violations of §§ 1 and 2 of the Sherman Act in connection with the network's practices and activities in producing, procuring and distributing prime time television programs. On November 17, 1976, pursuant to the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16, the parties filed with the Court a proposed consent judgment. Before such judgment may become final, the Court, following a period of publication of the proposed judgment and review of public comments filed with respect thereto, must determine "that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e) (1974). Presently pending before the Court are two separate motions to intervene in this case for the stated purpose of protecting interest allegedly affected by

the terms of the proposed judgment. Teleprompter Corp., representing various members of the pay cable television industry, has moved to intervene pursuant to F.R.C.P. 24, or otherwise participate in the proposed decree. The second prospective intervenor, CBS, Inc., also seeking formal intervenor status under Rule 24, is itself a party defendant in a similar antitrust action filed by the government in this Court. That action presently is in discovery. Both parties seek to obtain intervenor status so as to bring before the Court certain positions and arguments bearing on particular terms of NBC's proposed settlement with the government.

Both Teleprompter and CBS move for leave to intervene pursuant to F.R.C.P. 24(a), which permits a party to intervene as of right if certain conditions are satisfied, or in the alternative, pursuant to F.R.C.P. 24(b), which authorizes a court to grant permissive intervention. To qualify for intervention of right, a party must satisfy four basic requirements: (1) timely application; (2) the party must have an interest in the subject matter of the suit; (3) as a practical matter, the interest will be impaired by disposition of the action without the party's intervention; and (4) existing parties cannot adequately represent the moving party's interests. *See* F.R.C.P. 24(a); *Stockton* v. *United States*, 493 F.2d 1021, 1022-23 (9th Cir. 1974). If intervention of right is not available, a party may seek permissive intervention when its claim or defense has a question of law or fact in common with the main action.

MOTION OF TELEPROMPTER

Teleprompter represents over twenty members of the pay cable television industry (pay cable movants) who seek intervention in order to demonstrate that the proposed consent decree is anticompetitive and not in the public interest with respect to its treatment of NBC's practice of obtaining exclusive right in feature theatrical films against members of the pay cable television industry. The original proposed consent decree, filed on November 17, 1976, contained a provision placing certain restrictions on NBC's right to obtain exclusive rights against pay cable television. Deeming this provision a ratification of an anticompetitive and predatory practice of NBC, the pay cable movants on April 1, 1976, sought leave to intervene in order to challenge the substance and perceived consequences of this provision. Thereafter, apparently in response to numerous public comments filed pursuant to the procedures established by the APPA, the government and NBC filed with the Court an amended proposed consent judgment which deletes in its entirety the pay cable provision. The proposed decree now before the Court is silent on NBC's ability to obtain exclusive rights as against pay cable television. Notwithstanding the deletion, the pay cable movants press forward with their application for intervention, considering their formal participation in the case just as important under present conditions in order to advance their argument that the absence in the proposed judgment of adequate and affirmative relief against the practice of exclusivity is not in the public interest.

To obtain intervention of right, the pay cable movants must demonstrate a "significantly protectable interest" in the subject matter of the suit and, as a practical matter, that their ability to protect that interest may be impaired or impeded by disposition of the action absent their intervention. *See Donaldson* v. *U.S.*, 400 U.S. 517, 531 (1971); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). The interest asserted by the pay cable

movants is an interest to be free from anticompetitive and predatory practices in their industry. In particular, they see the NBC case as a means of achieving the cessation of a practice that has significantly and economically affected them for a number of years and which in their view is highly anticompetitive. The fact that NBC's custom of obtaining exclusive rights in feature films as to pay cable television is a part of a wider network of practices affected by the proposed judgment suggests that the interest pursued by the pay cable movants is not totally dissimilar to the interests of the government in this action. Nonetheless, it is questionable whether the pay cable television industry's interest in seeing an end to the networks' acquisition of exclusive rights is directly implicated in this suit now that the pay cable provision has been dropped. Under the now prevailing conditions, the interest of the pay cable parties has shifted from a position of contesting a provision which perhaps could have had tangible and adverse impact on the industry in the form of ratifying an allegedly anticompetitive practice to a position of urging the expansion of the remedies sought by the government to cover other possibly anticompetitive conditions. Because of the deletion of the pay cable provision, the interests of the pay cable movants necessarily have become less specific and urgent. Under the original decree there was evidence that the pay cable provision may set industry standards governing the practice of acquiring exclusive rights; the present decree merely ignores the issue, resulting in neither ratification nor rejection. On balance, the interest of the pay cable movants seems to fall short of the type of interests contemplated by F.R.C.P. 24(a).

Even if the Court were to conclude that the pay cable movants have a significantly protectable interest in this action, it could not find that as a practical matter their

ability to protect that interest will be impaired or impeded by disposition of this case absent their formal intervention.

First, it is patently clear that the proposed decree now before the Court, if approved, will have no *res judicata* effect on any future private or government antitrust action challenging NBC's practice of obtaining exclusive rights against pay cable television. No legal barriers to such a suit by the pay cable movants are introduced by disposition of this matter. Moreover, the Court's action on the decree should not result in any barriers of a practical nature; with the deletion of the pay cable provision, there exists no possibility that disposition of the NBC case will impose a *stare decisis* obstacle to a future challenge of the exclusivity practice. *See Atlantis Development Corp.* v. *U.S.*, 379 F.2d 813 (5th Cir. 1967); *Neusse* v. *Camp*, 385 F.2d 694 (D.C.Cir. 1967).

Second, the APPA provides an opportunity for the pay cable industry to bring before the Court, in ways other than by intervention, its views on the NBC proposed judgment. The APPA expressly mentions the possibility of full or limited participation by interested parties by way of amicus curiae or other roles as the Court deems necessary and appropriate. Indeed the pay cable movants already have filed with the government and the Court extensive comments regarding the advisability of affirmative relief against NBC's practice of acquiring exclusive rights against the pay cable television industry. These comments serve as a means of bringing before the Court various views not expressed by the named parties in the case and provide the pay cable movants an opportunity to achieve significant protection of their asserted interests. It must be remembered, however, that for purposes of F.R.C.P. 24(a), the controlling test is not whether an inter-

ested party is offered the utmost means to achieve the relief it seeks, but rather whether in the event intervention is denied disposition of the action may as a practical matter impair its ability to protect its interest in another forum at another time. Since the pay cable movants would suffer no such impairment, their application for intervention of right must be denied.

Permissive intervention under F.R.C.P. 24(b) is left to the discretion of the Court. *See* 3B Moore, Federal Practice ¶ 24,10[4]. In light of the opportunities for informal participation provided by the APPA and the pay cable industry's involvement in the action through the public comments it has filed, the Court does not consider formal intervention appropriate. This discretion is exercised with the view in mind that the public interest is best served by the fullest, yet most efficient consideration of the proposed settlement and a multiplication of parties with full-fledged procedural rights most probably will frustrate, rather than advance, an orderly determination of whether this judgment is in the public interest.

MOTION OF CBS

The interest asserted by CBS in the NBC action is that of a purchaser of television programs who desires to buy in a competitive marketplace. CBS contends the probable effect of the consent decree, if approved as presently proposed, would be a diminution in the supply of television programming and an increase in its price. Its interest as a primary purchaser of television programs, therefore, will as a practical matter be impaired by approval of the proposed judgment.

CBS's interest in the subject matter of the NBC case is not the type of specific, private interest characteristic of

private party intervention of right. *See Toles* v. *United States,* 371 F.2d 784 (10th Cir. 1967); *Atlantis Development Corp.* v. *United States,* 379 F.2d 818 (5th Cir. 1967). There is no conclusive showing on the present record that the consent settlement, if approved in its proposed terms, would result in a lessening of competition in the television programming market or have any other direct anticompetitive effect on the television industry. That of course is a major inquiry which the Court will pursue in its consideration of the decree. Not only is it undetermined that approval of the decree will result in a lessening of competition, it is equally uncertain that CBS will be directly and adversely affected by restrictions on NBC's ability to produce, procure and distribute prime time television programs. CBS does not rely upon NBC to supply any appreciable number of programs exhibited on the CBS network. The decree does not impose restraints on CBS's practices of procuring and producing television programming. And there has been no compelling showing that CBS will be hampered in acquiring from its regular sources suitable programs at a competitive price.

Even if the Court were to find that CBS has an interest in the action cognizable under F.R.C.P. 24(a), CBS's ability to protect that interest will not be impaired by disposition of the NBC consent decree absent formal intervention by CBS. CBS currently is in litigation with the government in a similar antitrust action which, if the government prevails, may result in much the same relief contained in the NBC settlement. Many of the provisions of that settlement, however, will not become effective unless the government obtains similar remedies against CBS. CBS thus stands fully capable, through its own litigation, to block the implementation of many of the changes it finds objectionable. More-

over, because the NBC case now involves a consent decree, which by its express terms does not bind the parties to any adjudication or admission of fact or law, disposition of the proposed decree will not have a *stare decisis* effect on the CBS litigation.

To the extent that CBS has an interest of a public nature in the NBC case, namely an interest in keeping television programming markets competitive, the APPA offers a number of safeguards to insure that such an interest is effectuated. Foremost, the law requires that before any government antitrust action may be settled by consent, the Court must be satisfied that the proposed judgment is in the public interest. 15 U.S.C. § 16(e). In conjunction with this determination, the Court is given broad authority to solicit and consider expert testimony, the views of all interested parties, and the like, and to take whatever steps, including the arrangement of participation by interested persons, the Court deems appropriate in order to give the proposed decree full ventilation. In this regard CBS has to date filed with the government and the Court extensive comments on the proposed judgment and its further participation in the consideration of the decree, if appropriate, is not precluded by the denial of its intervention motion. Secondly, the APPA affirms the primary duty of the government to see that the public interest is served by its antitrust enforcement actions. The Court is assured that with the procedures established by the APPA, together with the government's obligation to protect the interest of the public, whatever interest of a public nature CBS has in the NBC case will be adequately represented before the Court.

Based on the foregoing, the Court finds that CBS has not satisfied the requirements of intervention of right. Additionally for many of the reasons discussed above with

respect to Teleprompter's motion, the Court does not consider it necessary nor appropriate to grant CBS permissive intervention.

FUTURE PROCEEDINGS

Denial of these motions to intervene does not preclude participation by interested parties in the NBC action in other ways short of intervention. To the extent that a hearing, the taking of expert testimony, or other steps are necessary to make the determination required by law, the Court has the discretion to fashion the participation of interested parties accordingly.

IT IS ORDERED that the motions of Teleprompter and CBS respectively to intervene are denied and the Clerk of the Court will send, by United States mail, to counsel for the parties a copy of this Memorandum of Decision and Order.

Dated: June 20, 1977.

/s/ ROBERT J. KELLEHER

.....

Robert J. Kelleher
United States District Judge

FILED
June 20, 1977

Clerk, U.S. District Court
Central District of California

By Deputy

Court of Appeals Memorandum

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 77-3381

—o—

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant-Appellee,

and

CBS INC.,

Applicant for Intervention-Appellant.

No. 78-1068

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant-Appellee,

and

COLUMBIA PICTURES INDUSTRIES, INC., et al.,

Applicants for Intervention-Appellants.

—o—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Court of Appeals Memorandum

Before:

CARTER and WRIGHT, Circuit Judges, and SOLOMON,* District Judge

MEMORANDUM

In these consolidated appeals, CBS and six independent suppliers of television entertainment programs (CPI) appeal from the denial of their motions for leave to intervene in an antitrust action brought by the United States (government) against the National Broadcasting Company (NBC).

We affirm.

In 1974, the government filed three separate, identical antitrust actions against NBC, CBS and the American Broadcasting Company (ABC). The government charged each of the television networks with violating the Sherman Act by combining with affiliated stations to monopolize prime time entertainment programming shown on that network. This appeal arises out of the action against NBC.

To promote competition among independent producers like CPI, the government sought to limit each network's "in-house" production of entertainment programs. The government also sought to restrict the program rights which the networks may obtain from independent producers.

In November 1976, the government and NBC agreed on the terms of a proposed final consent judgment. In essence, the judgment would

(1) enjoin NBC from acquiring certain rights in programs other than the right of first network exhibition, and

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

enjoin NBC from syndicating programs—restrictions which are already in effect under FCC rules;

(2) prohibit NBC from refusing to broadcast an independent producer's program unless the producer granted NBC certain rights in the program—a prohibition which would take effect immediately;

(3) limit the number of prime time entertainment programs NBC may produce itself for exhibition on NBC stations—this limitation would not take effect until similar restrictions were placed on CBS and ABC; and

(4) restrict the terms which NBC may include in contracts with independent producers—most of these restrictions would not take effect until similar restrictions were placed on CBS and ABC.

Before a district court may approve a proposed consent judgment, the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16(b)-(h), requires that it "determine that the entry of such judgment is in the public interest."

The APPA sets out the matters which a district court may consider in making its determination. 15 U.S.C. § 16(e). These include

> "the competitive impact of such judgment . . . and any other considerations bearing upon the adequacy of such judgment; [and] the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial."

The APPA also provides that in making its public interest determination the district court may, in its discretion, "authorize full or limited participation in proceedings before the court by interested persons, including . . . intervention as a party pursuant to the Federal Rules of Civil Procedure, . . . or participation in any other manner and extent which serves the public interest as the court may deem appropriate." 15 U.S.C. § 16(f).

The government filed and published a competitive impact statement on the proposed consent judgment. Many interested parties—including CBS, CPI, ABC, pay cable companies, and Congressmen—filed with the court extensive written comments on the competitive impact statement. CBS complained that the consent judgment was too restrictive. CPI complained that it was not restrictive enough.

In April 1977, CBS filed a motion for leave to intervene in the NBC action under Rule 24(a)(2) and 24(b)(2) Fed. R.Civ.P. A month later, in response to the comments submitted on its competitive impact statement, the government amended the proposed judgment.

In June 1977, CPI moved to intervene in the NBC action under the same rules for "the limited purpose of demonstrating that the proposed consent decree . . . is not in the public interest. . ."

CBS and CPI both submitted voluminous briefs in support of their motions. The district court denied the motions to intervene.

In November 1977, the district court approved the proposed consent judgment.

CBS and CPI appeal from the denial of their motions to intervene.

We have jurisdiction to review the denial of those motions. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas*

Co., 386 U.S. 129 (1967); *Brennan* v. *Silvergate,* 503 F.2d 800 (9th Cir. 1974).

I. *Intervention of Right.*

Under Rule 24(a)(2) an applicant is entitled to intervene when

> " . . . the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Therefore, even if the applicant satisfies the first two criteria, it may not intervene if its interest is adequately represented by existing parties to the action.

In government antitrust litigation, the court will presume that there is adequate representation of the interests of absentee parties, unless there is a strong showing that the government is not vigorously and faithfully representing the public interest. *United States* v. *Hartford-Empire Co.*, 573 F.2d 1 (6th Cir. 1978); *United States* v. *Associated Milk Products Inc.*, 534 F.2d 113 (8th Cir. 1976), *cert. denied*, 429 U.S. 940 (1977).

CBS and CPI contend that their interests in this action are not adequately represented by the government.

There are only a few cases in which a private party has been permitted to intervene in an action in which the government represents the public interest. In each case the proposed intervenors made a strong showing of inadequate representation.

Such a showing was made in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co., supra.* There, in an earlier decision the Supreme Court held that El Paso's acquisition of the Pacific Northwest Pipeline Corporation violated the Clayton Act, and El Paso was ordered to divest itself of Pacific Northwest without delay. Instead of complying with the divestiture order, El Paso persuaded the government to negotiate a settlement. Cascade, whose sole supplier of gas was Pacific Northwest, sought to intervene under Rule 24(a)(2). The district court denied intervention and ultimately approved the settlement. On appeal, the Supreme Court held that Cascade was entitled to intervene because "the United States knuckled under to El Paso." *Id.* at 141.

Similarly, in *United States* v. *First National Bank and Trust Co. of Lexington,* 280 F. Supp. 260 (D.C. Ky. 1967), *aff'd per curiam sub nom. Central Bank and Trust Co.* v. *United States,* 391 U.S. 469 (1968), the trial court allowed intervention after it found "about a ninety per cent capitulation" by the government.

Here, neither CBS nor CPI made a strong showing that the government inadequately represents their interests. For this reason, they fail to satisfy the third requirement of Rule 24(a)(2). The district court correctly denied their motions to intervene as of right.

Under the circumstances, it is unnecessary to consider whether CBS or CPI satisfied the two other criteria for intervention.

II. *Permissive Intervention.*

CBS and CPI contend that even if they are not entitled to intervene as of right, the district court erred in denying them leave to intervene under Rule 24(b)(2).

Court of Appeals Memorandum

Under Rule 24(b)(2),

> "Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

CBS and CPI both satisfy the "common question of law or fact" requirement of the rule. But even when that requirement is met, permissive intervention is within the sound discretion of the district court. *May* v. *Commissioner of Internal Revenue*, 553 F.2d 1207 (9th Cir. 1977).

In exercising its discretion the district court considered the lengthy written comments on the proposed consent judgment, the contentions of CBS that the judgment was too restrictive and those of CPI that it was not restrictive enough. The court also considered whether intervention by CBS or CPI or either of them would unduly delay or prejudice the adjudication of the rights of the government and NBC. The court stated that "further participation [by CBS and CPI] in the consideration of the decree, if appropriate, is not precluded by the denial of [their] intervention motion[s]."

Denial of a motion to intervene under Rule 24(b)(2) may not be disturbed on appeal unless there was a clear abuse of the court's discretion. *Allen Calculators Inc.* v. *National Cash Register Co.*, 322 U.S. 137 (1944); *U.S. Postal Service* v. *Brennan*, 579 F.2d 188 (2nd Cir. 1978); *May* v. *Commissioner of Internal Revenue, supra.*

Neither CBS nor CPI has shown that the district court abused its discretion in this case.

Court of Appeals Memorandum

The denial of the motions for leave to intervene under Rule 24 is

AFFIRMED.

FILED
June 4, 1979

Emil E. Melfi, Jr. Clerk
U.S. Court of Appeals